IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE IRIS FEINERMAN REVOCABLE LIVING TRUST U/A/D MAY 24, 1995.

HELENE FEINERMAN,
Petitioner/Appellant,

v.

BOGUTZ & GORDON, P.C.,
Successor Trustee/Appellee,

and

ELY H. FEINERMAN,
Objector/Appellee.

No. 2 CA-CV 2019-0040
Filed October 7, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. PB20170108
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Waterfall, Economidis, Caldwell, Hanshaw & Villamana P.C., Tucson
By Corey B. Larson
Counsel for Petitioner/Appellant

Laber & Laber PLC, Tucson
By Edward Harris Laber
Counsel for Successor Trustee/Appellee

and

Walter L. Henderson P.C., Green Valley
By Phoebe L. Harris
Counsel for Objector/Appellee

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Judge Brearcliffe and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this case involving the Iris Feinerman Revocable Living Trust u/a/d May 24, 1995 ("Iris Trust") and the Aaron Feinerman Residuary Trust under Will dated May 14, 1982 ("Aaron Trust"), Helene Feinerman appeals the trial court's denial of her petition to remove Bogutz & Gordon, P.C., as successor trustee. Helene argues the court applied the wrong standard and erroneously found Bogutz & Gordon had not breached any of its fiduciary duties. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 The relevant facts are undisputed. Helene and her brother, Ely Feinerman, are the beneficiaries of their parents' respective trusts, the Iris Trust and Aaron Trust. In August 2016, after Aaron had died and Iris became incapacitated, Helene and Ely were named co-trustees of the trusts. Approximately five months later, in January 2017, Helene filed a petition to remove Ely as co-trustee, asserting he had "caused substantial gifts to be made to himself and his family." After Iris died on March 13, 2017, Helene and Ely agreed to appoint Bogutz & Gordon as successor trustee of both trusts. The trial court approved their stipulation on April 12, 2017.

¶3 Later that month, Helene met with Bogutz & Gordon and provided information regarding "Ely's self-gifting." Ely later acknowledged taking approximately $140,000 in trust funds, but he also accused Helene of taking funds from the trusts. Helene additionally

informed Bogutz & Gordon of a note and deed of trust held indirectly by the Iris Trust on a California condominium for Ely's daughter ("California mortgage"). Ely's daughter had stopped making payments on the California mortgage in 2015, and Ely agreed to cover the amount due.[1]

¶4 In August 2017, Bogutz & Gordon filed a petition for instructions and request for supervised administration of the trusts. The firm asserted, in part, that Helene and Ely were "making accusations of malfeasance . . . against each other and [were] demanding that [Bogutz & Gordon] investigate" but they "refus[ed] to constructively cooperate" in the administration of the trusts and were withholding "relevant financial records."

¶5 The following month, Helene filed an opposition to the petition for instructions and a cross-petition to remove Bogutz & Gordon as successor trustee. Helene argued Bogutz & Gordon had taken "no action" to recover the funds that "Ely stole [through] improper and excessive gifts to himself," had made a distribution to Ely "without offsetting the amounts that Ely stole or crediting against the [California mortgage]," had failed to make timely reimbursements to her, had not provided an "itemization of tasks undertaken" or a "calculation of the assets," and had improperly forwarded her mail—rather than just the mail for the trusts—to Bogutz & Gordon. Helene also filed a motion for an independent accounting, which the trial court denied.

¶6 After a two-day trial, the trial court issued an under-advisement ruling granting Bogutz & Gordon's request for a supervised administration and denying Helene's petition to remove the firm as successor trustee. In part, the court explained:

> The Court finds and the evidence supports that [Bogutz & Gordon] breached no duties owed to any beneficiary and acted reasonably throughout their administration of these Trusts. Given the complexity and level of cooperation by the parties, [Bogutz & Gordon] acted in a timely fashion in dealing with issues

[1]At trial, the parties disputed how and when Ely had agreed to repay the California mortgage. Ely testified that he had agreed the amount could be deducted from his trust distributions, and Bogutz & Gordon similarly understood that to be his position.

> presented by the beneficiaries. In particular [Bogutz & Gordon]'s decision not to pursue litigation against Ely for distributions he acknowledges he received from the Estates and is willing to have adjustments made to his ultimate distributions from the trusts is reasonable. This is especially true given he claims not to have the funds to pay now and any judgment obtained would have to await collection from his trust distributions. Also, Helene complains of late reimbursements when [Bogutz & Gordon] was only approved by the Court as Successor Trustee on April 10, 2017 and the reimbursements were made on August 22, 201[7]. This is not an unreasonable amount of time particularly when [Bogutz & Gordon] had to file a Petition for Instructions to obtain the records of the Trust from the prior Trustees. Also, the evidence demonstrates that when a mistake was made in listing an asset as belonging to one Trust instead of the other, the mistake was immediately acknowledged and corrected. Based on the evidence presented at trial, it is unlikely Helene would be satisfied by any Successor Trustee's performance or for that matter any future Trustee's performance.

Helene appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(4).[2]

[2] Because the under-advisement ruling lacked finality language pursuant to Rule 54, Ariz. R. Civ. P., this court suspended the appeal and revested jurisdiction in the trial court to allow "counsel to apply for an appropriate final judgment." However, it appears such action was unnecessary. *See Miller v. Superior Court*, 88 Ariz. 349, 352 (1960) (appeal of order removing trustee falls under § 12-2101(E), currently numbered § 12-2101(A)(4)); *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶ 19 (App. 2016) (compliance with Rule 54 not required for orders appealed under § 12-2101(A)(4)).

Discussion

¶7 Helene argues the trial court erred in denying her petition to remove Bogutz & Gordon as successor trustee of the Iris Trust and Aaron Trust. We review for an abuse of discretion the denial of a petition to remove a trustee. *See In re Estate of Newman*, 219 Ariz. 260, ¶ 39 (App. 2008).

¶8 A trustee owes fiduciary duties to trust beneficiaries. *See In re Kipnis Section 3.4 Tr.*, 235 Ariz. 153, ¶ 23 (App. 2014) (because Arizona Trust Code defines "trustee" to include "successor trustee," successor trustee possesses same authority and subject to same duties as trustee). Those duties include, but are not limited to, the duty to administer the trust in good faith, A.R.S. § 14-10801, the duty of loyalty, A.R.S. § 14-10802, the duty of impartiality, A.R.S. § 14-10803, the duty of prudent administration, A.R.S. § 14-10804, and the duty to inform and report, A.R.S. § 14-10813. "A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust." A.R.S. § 14-11001(A).

¶9 A trust beneficiary may request the removal of a trustee. A.R.S. § 14-10706(A). As relevant here, the trial court may remove a trustee if "[t]he trustee has committed a material breach of trust" or "[b]ecause of unfitness, unwillingness or persistent failure of the trustee to administer the trust for the benefit of the beneficiaries, the court determines that removal of the trustee best serves the interests of the beneficiaries." § 14-10706(B).

¶10 As both parties point out, there is no published case law interpreting § 14-10706(B). However, to the extent the language is plain and unambiguous, we apply it as written. *See Bentley v. Building Our Future*, 217 Ariz. 265, ¶ 12 (App. 2007). Moreover, because the Arizona Trust Code was modeled after the Uniform Trust Code, to the extent the language of § 14-10706 is the same as Unif. Trust Code § 706 (Unif. Law Comm'n 2000),[3] "we assume the legislature intended to adopt the interpretation of the statute placed on it by the drafters of the [uniform] act." *In re Indenture of Tr. Dated Jan. 13, 1964*, 235 Ariz. 40, n.3 (App. 2014).

[3]In relevant part, subsection (b) of Unif. Trust Code § 706 provides: "The court may remove a trustee if . . . the trustee has committed a serious breach of trust" or "because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."

¶11 In part, the comments to Unif. Trust Code § 706 explain:

> The grounds for removal are similar to those found in Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries.

In addition, Restatement (Third) of Trusts § 37 cmt. f (2003) provides: "The court will less readily remove a trustee named by the settlor than one appointed by a court. Courts may also show some but a lesser degree of deference with regard to a trustee appointed by beneficiaries or others pursuant to the terms of a trust."[4] *See Barrett v. Harris*, 207 Ariz. 374, ¶ 15 (App. 2004) (absent contrary law, we look to Restatement for guidance).

¶12 Helene first argues the trial court "failed to apply the appropriate 'lesser degree of deference'" standard under Restatement § 37 cmt. f because Bogutz & Gordon was "nominated by the beneficiaries." She maintains, "[i]nstead of applying [this standard]," the court ruled that "it is unlikely Helene would be satisfied by any Successor Trustee's performance or for that matter any future Trustee's performance." Helene thus reasons that the court's ruling constituted "plain error" because "nothing . . . permitted or allowed the . . . court to base its determination on speculation as to how Helene might come to feel about a possible replacement trustee." This argument, however, was not raised below.

¶13 Here, the trial court's under-advisement ruling does not indicate that it considered the "lesser degree of deference" standard

[4]Under A.R.S. § 14-10106(B), we must look to Restatement (Second) of Trusts, and not subsequent Restatements, to determine: (1) "[t]he rights and powers of creditors of beneficiaries"; (2) "[t]he duties of trustees to distribute to those to whom a beneficiary owes any duties"; (3) "[w]hether public policy may affect enforceability and effectiveness of the terms of the trust"; and (4) "[a]nd effectuate the settlor's intent." Because the factors for removal of a trustee do not fall within these categories, we look to Restatement (Third) of Trusts for guidance.

mentioned in Restatement § 37 cmt. f. If Helene had raised this issue below, the court could have easily addressed it. "Matters not presented to the trial court cannot for the first time be raised on appeal." *Brown Wholesale Elec. Co. v. Safeco Ins. Co. of Am.*, 135 Ariz. 154, 158 (App. 1982); *see also Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18 (App. 2007) (generally, arguments raised for first time on appeal untimely and waived). The rationale underlying this rule is that "a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994). And because Helene failed to raise this issue below, neither the court nor the opposing parties were afforded an opportunity to address the purported defect in the court's determination. *See id.* Accordingly, the issue is waived.[5] *See Odom*, 216 Ariz. 530, ¶ 18; *Brown Wholesale*, 135 Ariz. at 158.

¶14 Helene also disputes the trial court's determination that Bogutz & Gordon did not breach any of its fiduciary duties to her. "We are bound by a trial court's findings of fact unless they are clearly erroneous," *In re Estate of Jung*, 210 Ariz. 202, ¶ 11 (App. 2005), and we "examine the record only to determine whether substantial evidence exists to support the trial court's action," *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13 (1999). We address each of the alleged breaches in turn.

¶15 Helene contends that "[t]he trial court erred in disregarding the uncontroverted evidence" that Bogutz & Gordon "benefitted Ely to Helene's detriment." Specifically, she argues that the firm failed "to take any action with regard to Ely's malfeasance or to recover upon the California mortgage or even document in writing any agreement for its repayment." She maintains such conduct was a breach of the duties of loyalty, of impartiality, of prudent administration, and to administer the trust in good faith. *See* §§ 14-10801 to 14-10804.

¶16 A trustee has a duty to administer a trust in good faith, meaning, "in accordance with its terms and purposes and the interests of the beneficiaries." § 14-10801. The duty of loyalty similarly demands that

[5]Even assuming the argument were not waived, however, rather than speculating on appeal whether the trial court applied this standard, we would presume the court knew the law and applied it. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32 (App. 2004); *see also Estate of Newman*, 219 Ariz. 260, ¶ 39 (discussing preference for decedent's choice of personal representative and Restatement § 37).

a trustee "administer the trust solely in the interests of the beneficiaries." § 14-10802(A). "If a trust has two or more beneficiaries," the trustee's duty to act impartially extends to "investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests." § 14-10803. And the duty of prudent administration requires a trustee to "administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust." § 14-10804. "The term 'interests of the beneficiaries' means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries." Unif. Trust Code § 706.

¶17 Substantial evidence supports the trial court's determination that Bogutz & Gordon did not breach its fiduciary duties to Helene by declining to pursue legal action for Ely's "malfeasance" or for the California mortgage. *See Estate of Pouser*, 193 Ariz. 574, ¶ 13. Craig Wisnom, the managing member of Bogutz & Gordon, testified at trial regarding the firm's involvement in administering the trusts. He asserted that, as successor trustee, Bogutz & Gordon was "trying to act in the best interests of the beneficiaries" by working "in an efficient manner" and not "unduly wast[ing] time or resources."

¶18 As to Helene's assertion that Bogutz & Gordon did not pursue a "malfeasance" claim against Ely for the $140,000, Wisnom explained that, under Arizona law and the terms of the trusts, Bogutz & Gordon had to consider "whether the benefit to the trust estate and the ultimate beneficiaries [was] going to be worth the time and cost involved." He stated, for example, that the firm would not "spend $10,000 to try to recover $1,000" because that in and of itself "[could] possibly be a breach [of trust]." Because Ely lacked sufficient financial resources and because of similar accusations that Helene had taken funds from the trusts, Bogutz & Gordon determined that "[d]istribution and adjustment would be by far . . . more efficient" than bringing a lawsuit because "there were sufficient assets in the trust to cover this."[6] As to the California mortgage, Wisnom testified that, rather than foreclosing on the property, which would entail considerable administrative costs, "[i]t would be far, far easier and better for everyone involved, both beneficiaries, if Ely was willing to accept that as part of his share." And Wisnom understood from Ely that he was.

[6]Indeed, Helene and Ely reached an agreement in December 2017 that Ely's trust distributions would be offset by the $140,000.

¶19 A standard-of-care expert called by Bogutz & Gordon at trial similarly testified that he would not have sued Ely for the $140,000 or sought foreclosure on the California mortgage and would have instead settled those issues through the ultimate trust distributions. Although the expert suggested that he would have documented any such agreement in writing—which, as Helene points out, Bogutz & Gordon did not do[7]—he nonetheless opined that Bogutz & Gordon had not breached its fiduciary duties.

¶20 Helene also argues that the trial court erred in finding no breach of fiduciary duties because Bogutz & Gordon had failed "to inform and report to the beneficiaries with any degree of accuracy." She points out that the firm admitted to making mistakes in its accounting and provided her with "a pile of documentation," which she contends did not "satisfy the reporting requirements of . . . § 14-10813."[8]

¶21 Section 14-10813(A) requires trustees to keep trust beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." This court has previously determined that a "trustee's duty in that respect should be characterized by complete and continuing openness." *Kipnis Section 3.4 Tr.*, 235 Ariz. 153, ¶ 12.

¶22 Here, Wisnom testified that the accounting provided to Helene and Ely was "the most comprehensive" he could recall providing to any beneficiary. It included property inventories, financial summaries, bank statements, photographs, and more. Helene agreed she had received the documents, which, although they may have been numerous, were consistent with Bogutz & Gordon's obligation of complete openness. *See id.* Wisnom also recognized that Bogutz & Gordon had made "two mistakes on some of the financial summaries" but "corrected [them] right away." He explained that neither of the mistakes "would have made any difference in the distributions to the two beneficiaries." The expert also recognized that mistakes in complex cases sometimes occur, but he opined, as long as they

[7]At trial, Ely and Wisnom discussed an "undated note" in which Ely agreed to repay the $140,000 in gifts. However, the note is not part of our record on appeal.

[8]To the extent Helene challenges the accuracy of the accounting itself, the court precluded that issue from being discussed at trial because it had not properly been presented in the pleadings. Because Helene does not challenge that ruling, we do not address the issue further.

are remedied and the parties are notified, mistakes do not constitute "poor trustee work." Substantial evidence therefore supports the trial court's determination that Bogutz & Gordon did not breach its duty to inform and report. *See Estate of Pouser*, 193 Ariz. 574, ¶ 13.

¶23 At bottom, Helene's arguments amount to a request that we reweigh the evidence presented at trial. This we will not do. It is not our function "to reweigh the facts or to second-guess the credibility determinations of the judge who had the opportunity to evaluate the witnesses' demeanor and make informed credibility determinations." *Estate of Newman*, 219 Ariz. 260, ¶ 40. Because substantial evidence supports the trial court's ruling, we find no abuse of discretion in the denial of Helene's petition to remove Bogutz & Gordon as successor trustee. *See id.* ¶ 39.

Disposition

¶24 For the reasons stated above, we affirm.